No. 92-1162

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

9221 ASSOCIATES and EDWARD E. SCHMITT, AGENT,

Petitioners,

v.

INDUSTRIAL STATE BANK,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW IF PETITION FOR WRIT OF CERTIORARI WERE GRANTED

Were this Court to grant petitioners' Petition For Writ Of Certiorari only one question would be presented for review: Under Missouri agency law, does an unauthorized, unratified borrowing by an agent create a lien on his principal's real estate and loan proceeds that are his principal's property?

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STATEMENT OF THE CASE

In this action, Kroh Brothers Development Company ("KBDC"), the general partner of petitioner 9221 Associates ("9221"), borrowed money from two banks and purported to place mortgage liens on 9221's real estate. KBDC had neither actual nor apparent authority to do so, and 9221 did not ratify KBDC's borrowings or actions.

KBDC first borrowed $2.5 million from respondent Industrial State Bank ("ISB") and purported to give ISB a second deed of trust on 9221's real estate.[1] Seventeen months later, KBDC borrowed $4 million from Commerce Bank of Kansas City, purported to give Commerce Bank a second deed of trust on 9221's real estate, and repaid the ISB loan from the proceeds of the Commerce Bank loan. While taking money from both ISB and Commerce Bank, KBDC took no money from 9221.

Five months after ISB's loan was repaid, 9221 filed for relief under Chapter 11 of the Bankruptcy Code. 9221 filed this action two years later. Contending that KBDC had placed enforceable liens on its real estate and that therefore the Commerce Bank loan proceeds were its property, 9221 sought a judgment against ISB in the amount of $2.5 million -- the amount of Commerce Bank loan proceeds that KBDC used to repay the ISB loan.

The District Court reversed the Bankruptcy Court's judgment for 9221 [A.5-12], holding that under applicable Missouri law 9221's real estate "was unaffected in any manner" by KBDC's unauthorized, unratified acts and that 9221 "can assert no

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[1] ISB's parent company is Industrial Bancshares, Inc.; ISB has no nonwholly owned subsidiaries.

property interest in the proceeds of the Commerce loan" [A.11]. The Court of Appeals for the Eighth Circuit ("Eighth Circuit") affirmed the District Court for the reasons stated by the District Court. [A.1-4.] Without dissent, the Eighth Circuit denied petitioners' suggestion for rehearing en banc and petition for rehearing.

SUMMARY OF ARGUMENT

This case was correctly decided based on elementary principles of state law and raises only issues of state law. None of the "Questions Presented" set out in the Petition For Writ Of Certiorari ("Petition") are presented by this case. The petitioners' arguments in support of their position misstate both the law and the decision of the Eighth Circuit in this case.

ARGUMENT

REASONS FOR DENYING THE WRIT

9221 attempted in this case to convert the unauthorized, unratified acts of its general partner into a $2.5 million windfall. Applying elementary state-law rules of agency, the District Court and Eighth Circuit did not permit 9221 to do so. There is no conceivable reason for this Court to review the Eighth Circuit's decision.

This case does not present any of the "Questions Presented" set out at pages i and ii of the Petition. Questions 1-3 are based on the incorrect premise that the Eighth Circuit held that KBDC placed an "unauthorized lien" on 9221's real estate. That is not true. Applying elementary principles of agency law, the Eighth Circuit held that, under applicable Missouri law, KBDC's unauthorized, unratified acts placed *no* valid or enforceable lien on 9221's real estate. Question 4 incorrectly states that the Eighth Circuit held that a defendant in a bankruptcy avoidance action can defend on the ground that another transaction is avoidable. That also is not true. The Eighth Circuit did not touch the issue, and the District Court simply pointed out that "[c]ertainly ISB has standing to assert that 9221 had no property interest in the loan proceeds sought to be divested from ISB." [A.9 n.2.]

A. The Decision Below Creates No Conflict

Except for a standing issue, *see* D below, petitioners do not even argue that the Eighth Circuit's decision conflicts with a decision of another United States court of appeals or has decided a federal question in a way in conflict with a state court of last resort. *See* Supreme Court Rule 10.1(a). Rather, they argue that the Eighth Circuit's decision conflicts with two prior decisions of the Eighth Circuit: *In re Fox Hill Office Investors, Ltd.*, 926 F.2d 752 (8th Cir. 1991), and *In re West Tech, Ltd.*, 882 F.2d 323 (8th Cir. 1989). There is no conflict.

In *Fox Hill* (decided under Kansas law), in *West Tech* (decided under Florida law) and in this case (decided under Missouri law), the Eighth Circuit applied basic state law principles and reached the same result. Applying elementary rules of agency

law in all three cases, the Eighth Circuit held that the real estate of the partnership before the court could not be encumbered by the purported liens that their general partners attempted, without authority, to place on the real estate.[2]

B. The Decision Below Neither Limits Nor Misinterprets 11 U.S.C. §§101(54), 544 or 548

Petitioners incorrectly state that the Eighth Circuit's decision limits avoidable transfers under the Bankruptcy Code to "authorized" transfers. That is not true. The Eighth Circuit's decision is based on the fact that, under applicable Missouri law, the purported lien that KBDC attempted to place on 9221's real estate was invalid and resulted in *no* transfer. 9221's real estate "was unaffected in any manner." [A.4.]

C. The Decision Below In No Way Casts Doubt On Record Titles

Petitioners' hypothetical incorrectly assumes that a borrower can "obtain[] a mortgage" from an agent acting without authority. *See* Petition at 16. A borrower cannot do so.

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[2] "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 48, 55 (1979).

There is nothing in the record (nor could there be) that supports the statement at Petition 12 that "9221 Associates relied, in part, on the prior holdings of the Eighth Circuit in formulating its reorganization."

Petitioners' contention that under the Eighth Circuit's decision a chapter 11 debtor has "no remedy" in the event an invalid lien is recorded against his property, *see* Petition at 17, is wrong. He can do what any party would do: file an action to quiet title.[3]

D. The Decision Below Creates No Intercircuit Conflict

There is no conflict between the Eighth Circuit decision and the Seventh Circuit decision in *In the Matter of Xonics Photochemical, Inc.*, 841 F.2d 198 (7th Cir. 1988). ISB did not seek to exercise avoidance powers in this case. It simply defended on the ground that KBDC's unauthorized, unratified acts did not result in a valid lien on 9221's real estate or the transfer of any 9221 property. *See* decision of district court below at A-9 n.2.

[3] "The trustee in a case under this title has capacity to sue. . . ." 11 U.S.C. §323. "[T]he trustee or debtor in possession may . . . commence and prosecute any action or proceeding in behalf of the estate before any tribunal." Rule of Bankruptcy Procedure 6009.

CONCLUSION

For the reasons stated above, we respectfully request the Court to deny the Petition.

Dated: January 30, 1993

Respectfully submitted,

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